DOCUMENT RESUME

ED 084 637 EA 005 607

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TITLE [Tort Liability and School Transportation.]
PUB DATE 30 Oct 73
NOTE 11p.; Speech given before National Safety Congress and Exposition (61st, Chicago, Illinois, October 29 through November 1, 1973)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Accidents; *Court Litigation; Due Process; Guidelines; *Insurance Programs; *Legal Responsibility; Risk; School Buses; School Districts; Socially Deviant Behavior; Student Behavior; Student Rights; *Student Transportation
IDENTIFIERS Legal Liability

ABSTRACT

School districts, school employees, bus companies contracted by districts, and bus company employees could be involved in court litigation over student injury and student civil rights related to school bus transportation. Civil rights insurance should be added to general liability insurance and motor vehicle liability insurance. Students must be accorded due process in disciplinary proceedings and school districts must recognize potential liability situations and must notify their insurance carrier. To provide maximum protection, the school board and the bus company must keep student disruptive activity to a minimum, and it must be firmly dealt with. Proof to support the ousting of a student from riding the school bus must be substantial and well documented. (MLF)

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SUMMARY OF REMARKS BY ALLYN J. FRANKE AT SCHOOL TRANSPORTATION SECTION--SESSION 102, AT 1973 NATIONAL SAFETY CONGRESS AND EXPOSITION, HELD OCTOBER 30, 1973, ON THE SUBJECT OF TORT LIABILITY AND SCHOOL TRANSPORTATION.

Somebody's got to pay!! That is the universal cry today.

The clumsy boy falls over his own feet. Why didn't some one prevent it? Somebody's got to pay!!

Johnny got punched in the nose on the bus. It cost me $20 at the hospital. Somebody's got to pay!!

Always--somebody's got to pay.

How much? Not $20; 20 X 20; How about Johnny's feelings!

That's the starting point.

But who's to pay--

Well, you are.

Why? Because you are the nearest available target. You operated the bus. You operated the school. Who is a better target?

How are you protected?

Insurance may be the answer:

(1) If you can get full protection.

(2) If you don't blow the protection afforded by the insurance.

Let's take these up one at a time.

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First, let us examine whether full insurance protection is available.

Immediately we must divide this subject into two, three or four headings:

(1) At the outset, of course, we have the school district.

(2) Second we have the bus company if the district contracts the service.

(3) Third is the school employee.

(4) Fourth is the bus company employee.

Since there is no governmental immunity in Illinois, the school district is the prime target--also it has no insolvency potential, as does a person or corporation.

Illinois law also requires the district to indemnify and protect the employee against:

> " * * * civil rights damage claims and suits, constitutional rights damage claims and suits and death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board."

That pretty well protects the employee of the district, but the district itself is way out on the liability limb.

The bus company is also a prime target. But it does not have to indemnify its employees. Yet maybe the employees (this includes top management) should require that they be included as an added insured under the liability policy carried by the bus company, even if only to pick up costs

of defense should the manager be named as a defendant in the suit. The cost can be substantial--even when a defense is successful and a judgment for the defendant is secured.

Up to this point we have been proceeding under a basic misconception. The misconception relates to insurance. I am sure that all of us have been thinking about general liability insurance and motor vehicle liability insurance. Essentially tort liability.

But is this enough? How many bus companies carry civil rights insurance (sometimes called "wrongful acts" insurance), or has the school district to indemnify and defend the bus company against such a charge?

Today, however, the new area for the liability thrust is in the area of civil rights.

All students similarly situated have a right to ride the school bus if transportation is provided by the school.

No matter how disruptive a student is on the bus, some parents contend he cannot be disciplined or suspended from riding the bus. His civil rights are being abridged, should he be excluded from riding the bus.

Surprisingly enough the student may win even if at fault.

The school and bus company can lose!!

First because due process was not accorded in the disciplinary proceedings. And many times there are no rules and the judge makes them up as he goes along. Using his 20-20 hindsight, he can often find something that was not done according to the rules he sets up after the fact. Great care must be given to the procedural steps whenever a student is being prohibited from partaking in a regular school function for an extended period of time. Otherwise a meritorious case can be lost on a technicality.

Second, the school and bus company can lose because the witnesses are very inept and the burden of proving the charge is on the school and bus company. Fail to prove, and you lose.

The bus company can be drawn in along with the school and found guilty of violation of civil rights on a conspiracy charge.

Also when the bus company performs a function of the school district for the district, it becomes subject to the civil rights liabilities which normally do not apply to non-political bodies. It becomes an arm of the school district and as such assumes new liabilities.

Hence, the liability exposure is there. But where is the insurance protection or indemnification and defense protection?

It has been our experience that the most costly aspect of civil rights or wrongful acts litigation is the cost of defense.

It is seldom that damages are awarded other than contractual, but the costs of defense are substantial. Hence from an out of pocket cost approach, the undertaking to defend is more important then the reimbursement for any judgment rendered.

The buzz saw approach is widely used today. Make every possible concern or person a defendant. Better to have included ten who really should not be in the case than leave out the one that the judge or jury decides is at fault. Yet all the others must pay the costs to defend even though any liability is highly questionable.

Earlier I had mentioned that protection was related to having insurance and not blowing the insurance protection afforded. Let us examine how you can blow your insurance protection.

In Illinois liability exposure of school districts for negligence and wrongful acts is of fairly recent vintage.

Hence the school officials are not very sophisticated in recognizing potential liability situations. At times they do not give notification to their insurance carrier concerning the injury to a student. Months later an injury claim notification or intent to file suit is served on the district and then sent on to the insurance carrier. It declines coverage on the basis of failure to comply with the provisions of the insurance poiicy requiring notice of the incident to be given the insurance company as soon as practicable. As a result the insurance company declines coverage. The result is that you have no insurance.

Does this happen often? Well, we now have 3 cases pending in our office in which the insurance company is taking the position of no coverage because of failure to notify the insurance company promptly. I can assure you that the risk is real.

I have outlined the problems, but what can the school board and the bus company do to provide maximum protection?

First, we will take up control on the school bus. Normally, there is no monitor who rides the bus and hence the bus driver has the whole student group to control while he or she drives. Both (1) because liability is often predicated upon failure to control or supervise, and (2) because disruption seriously reduces the ability of the driver to

properly control the bus, student disruptive activity must be kept to a minimum and firmly dealt with. It may be necessary to remove the student from the bus permanently. It is my experience that in a great percentage of instances there is at least one parent with a problem behind each student who creates problems. Such parents are often quite irrational and will contest any action taken against their little darling. This is where the civil rights or wrongful acts questions become involved. Proof to support the ousting of the student from riding the school bus had better be substantial and well documented. The personnel operating the school buses should be instructed in the proper procedures to follow. School officials should likewise understand the applicable procedures. Normally there is a series of incidents leading up to ejection of the student from the bus. The driver will recognize early that Johnny is a real problem and may become impossible to tolerate. The driver should, as early as possible after first recognizing the potential, file with the school officials a written report of each incident promptly after it occurs. The driver is then able to support the removal of the student from the bus by specific records. Too often when no records are kept the driver is a poor witness, and his testimony is torn apart by the lawyer for the student. The testimony of the

driver is that the student was unruly on many occasions; that he caused a lot of problems, but the driver can't remember the exact days on which the student caused the problems or exactly what happened on any particular day. Things kind of run together, and the driver has nothing but a series of conclusions.

This is to be contrasted with the driver who has each instance clearly in mind as he goes through the details of each incident report. On March 14th Johnny jumped out of his seat, ran half the length of the bus, pushed three students on the way and left one with a bloody nose. On March 20th Johnny lit a fire in the bus with some paper, and so on, specifying each day that each particular event occurred.

This type of evidence will support the action taken in banning the student from the bus while the fumbling attempts to remember as pointed out above will often result in a judge's finding that the facts do not justify the action taken in banning the student from the bus, and damages may be awarded. It is also important to note that if there is strong, well documented evidence, the parents' lawyer may advise them that the court action would be fruitless.

I know it is difficult to educate the drivers to make such reports and include therein details about the

incident. Yet, if you are to protect against possible liability and costs of defense, this is what the courts have indicated is necessary to justify and support the action of the authorities in charge of the buses.

One additional word of warning: Student witnesses are notoriously unreliable, and often parents will not permit them to testify. What looked like good evidence to support action may quickly evaporate when the facts must be proven through students.

Shifting now to the other area--what can be done about complying with the insurance policy requirements on notice? Two steps should be taken. First, the insurance company should be requested to furnish report forms and to provide written directions as to what type of incidents should be reported to the insurance company. Let me illustrate. Should every injury to a student on the bus be reported no matter how small? Should potential liability be assessed and only those incidents reported where it appears that a claim will be made that the bus company or the school district was at fault?

Let us take the illustration of a student who is bumped to the floor in the bus by another student who is roughhousing. The driver restores peace, and one student complains that his back hurts, but when he leaves the bus,

the driver doesn't notice anything particularly unusual in the action of the student. No report is made by the driver. Unknown to the driver, the student's back gets worse and finally over a period of two years the student becomes seriously disabled.

The school nurse knows of the boy's condition, but not of the bus tie-in. She does not know what started the condition. The parents have collected from the group student hospitalization insurance carried through the school for the hospital stay of the student, but at no time have they ever indicated that they were holding the school or the bus company in any way responsible for the condition of their son, nor have they told the school officials of the bus incident. Three years after the incident, notice of intent to file suit is served on the school and the bus company. The insurance company rejects defense because of failure to notify promptly after the incident occurred. The loss potential is in the hundreds of thousands because of the severity of the injury. But the insurance company will not defend.

You can see the extreme importance of finding out from the insurance company which incidents must be reported and what authority there is to evaluate potential liability, if any. Then you must transmit to your employees the information required and see that they comply with the filing

requirements.

Loss of insurance coverage because of failure to notify need not occur if preliminary steps are promptly taken. The required steps may increase costs of operation, but they may save thousands of dollars. You may think the illustration I gave was a figment of my imagination and really couldn't happen. Yet I tell you it is quite similar to a case presently pending in the courts. I merely changed a few facts to place the incident on a school bus. I assure you it can happen.

As is so often true, early recognition of problem areas and constructive application of remedial steps will reduce potential liability exposure and serious dollar losses in school bus operations.

Let you not be <u>the</u> "Somebody who's got to pay!"